STATE OF MICHIGAN

IN THE SUPREME COURT

THERESA O'DAY DEROSE, (a/k/a Theresa Seymour),

Plaintiff/Third-Party Defendant-Appellee,

v

Supreme Court No. 121246

Court of Appeals No. 232780

JOSEPH ALLEN DEROSE,

Trial Court No. 97-734836-DM

Defendant-Appellee,

v

CATHERINE DEROSE,

Third Party-Plaintiff-Appellant.

_____/

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BRIEF IN SUPPORT OF MOTION OF AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN TO FILE AS *AMICUS CURIAE*

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STATEMENT OF THE FACTS

The facts relevant to the constitutional issues presented by the *amicus curiae* in this brief are set forth in the opinion of the Court of Appeals. *DeRose v DeRose*, 249 Mich App 388 (2002). Plaintiff Theresa O'Day DeRose was married to defendant Joseph Allen DeRose, who is the son of plaintiff/third-party defendant Catherine DeRose. The plaintiff and defendant were divorced after the defendant admitted abusing his stepdaughter, the plaintiff's daughter from a previous marriage. Plaintiff and defendant had a daughter together, Shaun Ashleigh Derose, born on April 1, 1996. The judgment of divorce granted the plaintiff sole legal and physical custody of Shaun. While the divorce action was pending, the defendant's mother, Catherine DeRose, filed a petition for grandparent visitation with Shaun, pursuant to MCL 722.27b. The plaintiff opposed the request, citing the fact that Catherine DeRose had denied her son's abuse of plaintiff's other daughter, and that she did not think it was in Shaun's best interest to have visitation with Catherine.

The trial judge overrode the plaintiff's objections. Noting that she was a grandmother herself and that her niece, who did not have any grandparents, "borrows grandparents," she said that "Grandmothers are very important," and that there was no reason in this case that Shaun "be deprived of a grandmother." She went on to say that,

> I realize that this is difficult, a very difficult time for the 12-year old, but the 12-year old is not going to be required to see this lady. This is like two hours of supervised visitation and I know that mom – now, I'm sure mom feels, well, I made a bad choice, I wasn't aware – this, that and the other thing. So now she wants to overreact. It makes no sense to me that this grandmother can't have two hours of supervised visitation and even four hours of supervision as recommended by the Friend of the Court and that's plenty of time to evaluate whether anything bad or wrong happens. It's very troubling that the concept that somehow this whole incident can be erased by keeping the child's actual grandmother away from

her. It can't be, and everybody is going to have to learn to deal with it which is not happy, it is not good.

DeRose, 249 Mich App at 389.

It is indisputably clear that the trial judge substituted her own judgment as to the suitability of grandparent visitation by the mother of Shaun's incarcerated father for the judgment of Theresa, Shaun's custodial parent. In the opinion of the trial judge, Theresa was "overreacting" to her "bad choice" in marrying Catherine's son, and whether Theresa liked it or not, Catherine was going to get at least two hours of supervised visitation with Shaun. *Ibid.* at 389. It was "troubling" to the trial judge that Theresa may have believed that "somehow this whole incident can just be erased by keeping the child's actual grandmother away from her." *Ibid.* at 389. As far as the trial judge was concerned, "It can't be, and everybody is going to have to learn to deal with it which is not happy, it's not good."

In rendering her decision, the trial judge relied on MCL 722.27b, which provides that, "[I]f the court finds that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions." MCL §722.27b (3).

On appeal, the Court of Appeals held that MCL 722.27b was unconstitutional under the United States Supreme Court decision in *Troxel v Granville*, 530 US 57 (2000), and vacated the trial court's order of grandparent visitation. On October 8, 2002, this Court issued an order granting leave to appeal on the issue of the constitutionality of the statute, on its face and as applied in this case.

SUMMARY OF ARGUMENT

Amicus curiae agrees with appellees that the United States Supreme Court's decision in *Troxel v Granville*, 530 US 57 (2000) renders the grandparenting time provisions of MCL 722.27 (b) unconstitutional on their face. Permitting a court to override decisions of custodial parents concerning the extent, conditions or existence of grandparent visitation based on the subjective "best interests of the child" standard violates the fundamental liberty interests of parents in the care, custody and control of their children.

In recognizing this fundamental interest, the Michigan Supreme Court should not define parent-child relationships by biology alone and should protect parent-child relationships when in fact they exist, regardless of legal technicalities. It may be constitutionally permissible for a court to order visitation over the objections of custodial parents where 1) there has been a substantial relationship between the grandparent and the child and the custodial parent has cut off the relationship completely, 2) the grandparents have the burden of proof and the court has determined that the parent's action is an arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child, and 3) the court-ordered visitation for the grandparents is presented by the custodial parent, so that it does not interfere with parent-child relationship or with the parent's rightful authority over the child.

ARGUMENT

I. The Grandparenting Time Provisions of MCL 722.27b Are Unconstitutional on Their Face.

In *Troxel*, the Supreme Court strongly affirmed the constitutional right to parent and held that recognition of this right mandated that any court order for grandparent visitation be subject to significant constitutional constraints. It did so in the context of affirming the decision of the Washington Supreme Court invalidating a state law that allowed "any person" to petition for visitation rights under the broad "best interests of the child" standard. 530 US at 63. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Ginsburg and Breyer, wrote the principal opinion. She found that the law, as applied in this case, "unconstitutionally infringes on the fundamental parental right to make decisions concerning the care, custody and control of their children." *Id.* at 72.[1]

The Court recognized that the interest of parents in the care, custody and control of their children "is perhaps the oldest of the fundamental liberty interests recognized by this Court." 530 U.S. at 65. The constitutional right to parent traces back to the 1920's cases of *Meyer v*

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[1]In *Troxel*, all the Justices except Justice Scalia agreed that the right to parent was a fundamental right and that grandparent/third party visitation laws implicated that right. The six Justices voting to affirm the decision of the Washington Supreme Court agreed that the visitation order in that case violated the constitutional rights of the custodial parent. Five Justices, the four Justices in the O'Connor plurality and Justice Souter, agreed that the state could not use a generalized "best interests of the child" standard to determine third party visitation, and it would appear that Justice Thomas' opinion supports this position. For these reasons, it is submitted that the Court's holding in Troxel is properly based on the O'Connor plurality opinion, and this is how it has been seen by the lower courts in the cases arising after Troxel. *See e.g.*, *Linder v Linder*, 348 Ark 322, 72 SW2d 841 (2002); *Zasueta v Zasueta*, 102 Cal App 4th 1242, 126 Cal Rptr 2d 245 (2002); *Wickham v. Byrne*, 199 Ill 2d 309 (2002); *State of Louisiana in the Interest of Satchfield v Guillot*, 80 So 2d 1255 (La App 2002); *Wilde v Wilde*, 341 NJSupr 381, 775 A3d 535 (2001).

Nebraska, 262 US 390 (1923), where the Court held a state law prohibiting the teaching of children in any language other than English and the teaching of any foreign language at all to elementary school children violated due process, and *Pierce v Society of Sisters*, 268 US 510 (1925), where the Court again held unconstitutional a state law prohibiting parents from enrolling their children in private schools. Once parental rights have come into being by birth or adoption, they can only be terminated by clear and convincing evidence of parental unfitness. *Santosky v Kramer*, 455 US 745 (1982). See *Ruppel v Lesner*, 421 Mich 559, 566 (1984) ("We conclude that where a child is living with its parents, and divorce or separate maintenance proceedings have not been instituted, and there has been no finding of parental unfitness in an appropriate proceeding, the circuit court lacks the authority to enter an order giving custody to a third party over the parents' objection.)

Because the right to parent is a fundamental right, any state interference with that right must be justified under the exacting compelling governmental interest standard of review. Some obvious examples of constitutionally permissible actions by the state in opposition to the parents' wishes would be a requirement that the child attend school, see *Meyer v Nebraska*, *supra*, 262 US at 399, or receive a life-saving blood transfusion or an inoculation against disease. See *Jacobson v Massachusetts* , 197 US 11 (1905). But the state's generalized assertion of "the best interests of the child" obviously cannot constitute a compelling governmental interest for constitutional purposes so as to override the fundamental right to parent.

The holding of the United States Supreme Court in *Troxel* imposes three significant constitutional constraints on the application of grandparent visitation laws. One. The trial judge must proceed on the assumption that fit parents will act in the best interests of their children, and

the judge must accord "special weight" to a parent's decision to limit or deny grandparent visitation. Two. The trial judge cannot use the "best interests of the child" test to override the decisions of the custodial parent concerning the extent and conditions of grandparent visitation, or in most cases, whether there should be any grandparent visitation at all. Three. Any visitation order must not interfere with the parent-child relationship or with the parent's rightful authority over the child.

Thus, the decision of United States Supreme Court in *Troxel v Granville*, 530 US 57 (2000), impacts grandparent visitation as we have known it.[2] *Troxel* brings to a crashing end the notion advanced by advocates of "grandparents' rights" and "childrens' rights" that the Constitution somehow permits the state to balance the rights of parents against the claimed rights of grandparents and children and to restrict parental decisionmaking "in the best interests of the child." And it makes it clear that in our constitutional system, it is the parent, and not the state, who has the primary right and responsibility to decide what is in "the best interests of the child."

These constraints are clearly evident in a number of post-*Troxel* state court cases that have either invalidated state grandparent visitation laws on their face, *R.S.C. v J.B.C.*, 812 So 2d 361 (Ala Civ App 2001); *Belair v Drew*, 776 So 2d 1105 (Fla App 5 Dist 2001); *Santi v Santi*, 633 NW 2d 312 (Iowa 2001), or have held that the application of the law to allow a grandparent

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[2]In the years before *Troxel*, some states held that the application of their grandparent visitation laws violated the constitutional right to parent under the federal or state constitution. *See e.g.*, *Von Eiff v Aziciri*, 720 So 2d 510 (1998); *Fink and Austin v Corlett*,1999 Ok.Civ App 44, 980 P 2d 1128 (1999); *McVay v Blein*, 1996 Tenn App LEXIS 828 (Tenn App1996). In Michigan, the only constitutional challenge to the grandparent visitation law was an equal protection challenge to the denial of a provision for grandparent visitation to the grandparent of an out-of-wedlock child. This Court held that grandparent visitation was not a fundamental right for equal protection purposes, and applied the rational basis test to uphold the exclusion. *Frame v Nichols*, 452 Mich 171 (1996).

visitation order in the particular case violated the constitutional rights of the custodial parent. *Seagrave v Price*, 79 SW 3d 339 (Ark 2002); *Kyle O. v Donald R.*, 102 Cal Rptr 2d 476 (2000); *Brice v Brice*, 754 A 2d 1132 (Md App 2000); *Wilde v Wilde*, 775 A 2d 535 (NJ Super 2001); *Fishel v Fishel*, 2002 WL 31521778 (Ohio App 5 Dist 2002); *Neal v Lee*, 14 P 3d 547 (Okla 2000); *Newton v Thomas*, 33 P 3d 1056 (Or App 2001). Those states that have upheld these laws have done so because they have built-in statutory thresholds that must be reached before a court can grant grandparenting time.[3]

Michigan's grandparent visitation law, MCL 722.27b, therefore, cannot constitutionally be applied as written and so is unconstitutional on its face. Here, the law allows a judge to order

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[3]See *McGovern v McGovern*, 33 P 3d 506 (2001) (Arizona) (statute presumes that parent's decision to deny visitation is in child's best interest; grandparents have burden of presenting evidence to rebut this presumption); *Harris v Harris*, 112 Cal Rptr 2d 127 (2002) (California) (rebuttable presumption contained in statute that parent-opposed visitation is not in child's best interest, requiring clear and convincing evidence that that child will suffer harm or potential harm if visitation is not ordered); *Galjour v Galjour*, 795 So 2d 350 (App 2001) (Louisiana) (scope of visitation limited to parents of deceased or absent parent, visitation order in consultation with the custodial parent); *Rideout v Riendeau*, 761 A 2d 291 (2000) (Maine) (there must be a sufficient existing relationship between grandparents and children for standing; in case at hand grandparents had acted as parents for child); *Zeman v Stanford*, 789 So 2d 798 (2001) (Mississippi) (requires more than best interests of child; chancellor must consider certain factors to ensure that parents are not deprived of right to rear children); *Blakely v Blakely*, 83 SW 2d 537 (2002) (Missouri) (limits to cases where grandparents can prove that parents' denial of visitation was unreasonable; requires home study, consultation with child, and appointment of guardian ad litem); *Williams v Williams*, 50 P 3d 194 (2002) (New Mexico) (constitutional as applied; statute considers prior relationship with child and grandparent, the wishes and opinions of parents, and willingness of grandparents to facilitate and encourage close relationship among parent and child); *Currey v Currey*, 650 NW 2d 273 (2002) (South Dakota) (statute incorporates best interests of the child and requirement that visitation not interfere with parent-child relationship; burden of proof on grandparents); *Ex rel Brandon v Moats*, 551 SE 2d 674 (2001) (West Virginia) (statute requires that visitation would not substantially interfere with the parent-child relationship; includes consideration of preference of parents with regards to requested visitation as one of best interests factors).

grandparent visitation, without regard to the wishes of the custodial parent, in any case in which the judge concludes that grandparent visitation is "in the best interests of the child." Under the law, the judge is not required to accord any weight, at all, let alone "special weight," to a parent's decision to limit or deny grandparent visitation. There is no requirement that the visitation order not interfere with the parent-child relationship or with the parent's rightful authority over the child. In short, Michigan's grandparent visitation law contains all the constitutional defects of the Washington law invalidated in *Troxel*.

As will be pointed out in the next section of the brief, there are some very limited circumstances in which a court's entry of a grandparent visitation order may be constitutionally permissible. Indeed, Justice O'Connor emphasized that the Court did not have to "define today the precise scope of the parental due process right in the visitation context." She agreed with Justice Kennedy that the constitutionality of any standard for awarding visitation "turns on the specific manner in which that standard is applied" and that the Court "would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter. *Id.* at 73-75.

Thus, should this Court hold that the grandparent visitation statute can remain in force and can be applied within constitutional limits, it must define those limits very precisely and make clear that the "best interests of the child" test may no longer be used in determining grandparent visitation.[4]

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[4]There have been instances in which a Michigan law could no longer be enforced as written as a result of a United States Supreme Court decision, and this Court has held that the law remained in force and could be applied within constitutional limits. See *e.g.*, *People v Bricker*, 389 Mich 524 (1973) (state anti-abortion law applies within constitutional limits and law may be applied to prohibit performance of an abortion by a non-physician). In the present case, the

II. There Are Limited Circumstances in Which It May Be Constitutionally Permissible for a Court to Order Grandparent Visitation Over the Objections of the Custodial Parent.

Like other fundamental rights, the right to parent is not absolute, and, as pointed out previously, the state may interfere with that right, where the state's action is precisely tailored to advance a compelling state interest. In only very limited circumstances, however, may the state may interfere with the parent's decisionmaking authority by ordering grandparent visitation.

It is the submission of the *amicus curiae* that guidance as to the constitutional permissibility of grandparent visitation orders after *Troxel* can be found in the dissenting opinions of Justices Stevens and Kennedy. Both Justices contended that a grandparent visitation order could be constitutionally permissible where the denial of grandparent visitation reflects an "arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child." 530 US at 89 (Stevens,J., dissenting); 530 US at 98-100 (Kennedy,J., dissenting).

The first question for the court to consider is whether the custodial parent is now allowing some visitation or is willing to do so. So long as the custodial parent allows some visitation, the relationship between the child and the grandparent is preserved. But the custodial parent must be free to decide the nature and extent of the visitation and the terms under which it will take place. The judge cannot constitutionally substitute his or her judgment for that of the custodial parent with respect to what visitation is "reasonable." As a constitutional matter, then, disagreements between the custodial parent and the grandparent over the nature, extent and terms of visitation cannot be turned over to the courts. These disagreements must be resolved by the parties

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Court of Appeals held that it would not attempt to interpret MCL 722.27b in a manner consistent with the Constitution, because "such an effort would require a significant, substantive rewriting of the statute." 249 Mich App at 395.

themselves, with the custodial parent having the final say.

Assuming that the custodial parent has denied visitation entirely, the court should then consider whether there has been a substantial existing relationship between the grandparent and the child. Suppose, for example, that the grandparent has lived out-of-state for a number of years and has rarely seen the child. The grandparent then moves back to Michigan and decides that he or she would like to "be a grandparent." This would involve placing the child in a new relationship, and the custodial parent may decide that such a new relationship is not in the best interests of the child. A court cannot constitutionally override that decision on the ground that the judge thinks that it is "in the best interests of children" to have a relationship with their grandparents. That decision, in our constitutional system, belongs to the custodial parent.

Where there has been a substantial existing relationship between the grandparent and the child, and the custodial parent cuts off that relationship completely, we have a situation in which a visitation order may be constitutionally permissible. Suppose that a couple have been married for a number of years, and the father's parents have enjoyed a substantial grandparenting relationship with the children. The father abandons the family and leaves the state. The mother then informs the fathers' parents that they will "never see the children again." The father's parents then petition the court to order grandparent visitation. In this situation, the Court may find that the mother acted in a way that is arbitrary and unreasonable and may make a provision for grandparent visitation.

The final constitutional requirement is that the court-ordered visitation for the grandparents not interfere with the parent-child relationship or with the parent's rightful authority over the child. The judge should direct the custodial parent to present a plan for grandparent

visitation under which the parent will decide the nature and extent of grandparent visitation and the terms under which it will take place. The judge should accept the plan unless it is so patently unreasonable as to be an effective denial of grandparent visitation. The judge cannot constitutionally decide what amount of grandparent visitation is "reasonable" or the circumstances in which it shall take place.

It is thus the submission of the *amicus curiae* then that the circumstances in which a court can constitutionally order grandparent visitation over the objections of the custodial parent are very limited. It is only within these limited circumstances that the provisions of MCL 722.27b may be constitutionally applied.

III. The Grandparent Visitation Order Entered in the Present Case Clearly Violates the Constitutional Rights of the Custodial Parent.

The grandparent visitation order entered in the present case clearly violates the rights of the custodial parent. It is indisputably clear that the trial judge substituted her judgment as to the suitability of grandparent visitation by the mother of the child's incarcerated father, Catherine DeRose for the judgment of the child's custodial parent, Theresa DeRose.

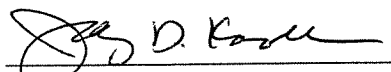
Instead, the trial judge treated Theresa's objections dismissively, accusing her of "overreacting" because she "made a bad choice," and saying that there was no reason why the child should be "deprived of a grandmother." It was also very troubling to the judge that the custodial parent apparently thought that "this whole incident can be erased by keeping the child's actual grandmother away from her." The judge would not let it be that way: "It can't be, and everybody is going to have to learn to deal with it which is not happy, it is not good."

In a situation that was not "happy" or "good," a situation in which the grandmother's son was incarcerated and in which the grandmother denied her son's abuse of the child's sibling, the child's mother made a decision that by no stretch of the imagination could be considered an "arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child." Here, as in *Troxel*, the trial judge and the custodial parent had a "simple disagreement concerning her children's "best interests," and *Troxel* make it clear that in our constitutional system, it is the mother's view as to what is in her children's "best interests" that must prevail.

CONCLUSION

For the reasons stated herein, it is the submission of the *amicus curiae* that the judgment of the Court of Appeals should be affirmed by this Court.

Respectfully submitted,



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